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No. 612 MISC.

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In The Supreme Court of The United States

October Term, 1957

LOUIS GLENN BALLARD,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1957

NO.

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-vs-	)
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UNITED STATES OF AMERICA,	)
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on January 7, 1958.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of August 13, 1957, is not reported but is copied in Appendix A, infra; and the opinion of the Court of Appeals of January 7, 1958, is as yet unreported (C. T. 3), but is copied in Appendix B, infra.

JURISDICTION

The first opinion of the Court of Appeals for the Ninth Circuit was dated and entered on August 13, 1957. Petitioner filed a petition with the Court of Appeals for Rehearing on September 5, 1957. On January 22, 1958, the Court of Appeals denied the Petition for Rehearing, meanwhile the Court of Appeals for the Ninth Circuit rendered its second opinion on January 7, 1958, and judgment was dated and entered on January 7, 1958. (Appendix C) On February 13, 1958, by order of the Honorable Earl Warren, Chief Justice of the Supreme Court of the United States, the time within which to file a petition for Writ of Certiorari was extended to and including March 21, 1958.

The jurisdiction of the Court is involved under Title 29, United States Code, Section 1254 (1) and Rule 37 (c) of the Federal Rules of Criminal Procedure.

BASIS OF JURISDICTION BELOW

Petitioner was indicted by the Federal Grand Jury in the Southern District of California, Los Angeles, on May 25, 1955. The indictment contained ten counts, only three of which, Counts IV, V and VI, named

petitioner as defendant.

Count I charged a conspiracy, 18 U.S.C. 371, naming Clifford L. Duke, Jr., Fred W. Steiner, Nicholas Spicuzza, Olive Spicuzza, John W. Hadzima, Charles W. Vosburg, Charles Walker, George Todd, Roy Pursselley, George Monolias, Samuel Segovia, Donald F. Hamm, Edward V. King and Robert Helm as conspirators with Duke the only named defendant.

Counts II and III charged a violation of 18 U.S.C. 545 against Duke only.

Count IV charged a conspiracy, 18 U.S.C. 371. The offenses, the commission of which was the object of the conspiracy, were stated to be the importation and concealment and transportation after importation of psittacine birds contrary to law. This count of the indictment alleges the conspiracy commenced in April of 1953, the date of the first overt act set forth is April, 1953, and the date of the last overt act set forth was June, 1953. The conspirators were alleged to be Clifford L. Duke, Jr., Vic Buono, petitioner Ballard, John W. Hadzima, Phyllis Hadzima, Mary Asconi, Roy Pursselley, and Robert Helm, with Clifford L. Duke, Jr., Vic Buono and petitioner Ballard the only named defendants.

Counts V and VI charged a violation of 18 U.S.C. 545 against petitioner, Duke and Buono.

Count VII charged a conspiracy, 18 U.S.C. 371, naming Duke, Buono, Robert Helm, Nicholas Spicuzza and Albert Appel as conspirators, with Duke and Buono the only named defendants.

Counts VIII, IX and X charged a violation of 18 U.S.C. 545 against Duke and Buono.

The District Court had jurisdiction of the cause under Title 18, Section 3231, which confers upon the District Court original jurisdiction of all offenses against laws of the United States.

IMPORTANT STEPS IN TRIAL COURT

On June 15, 1955, petitioner filed his notice of motion to move for a severance. (C.T. P. 42-43) This motion was heard by Judge Weinberger and in a rather lengthy opinion from the bench on June 23, 1955, Ballard's motion for severance from his co-defendants and a separate trial, and his alternative motion that the trial of counts four, five and six be separate from the trial of counts one, two, three, seven, eight, nine and ten, if he was not granted severance from his co-defendants, was denied and each motion denied. (TR. 71A, Line 3 - 80A line 9)

Petitioner filed a demand for a Bill of Particulars. (C.T. 23, 25); and affidavit of his counsel in support thereof (C.T. 21, 22) and Points and Authorities, (C.T. 26, 27) all on June 7, 1955. This was rather thoroughly argued on June 23, 1955, and partially denied. Subsequently the court denied the demand in toto. (C.T. 77)

At the conclusion of the Government's case, petitioner moved the Court for entry of judgment of acquittal as to Counts Four, Five, and Six. (TR.1889)

Petitioner moved to strike from the record all testimony of Spicuzza, Hadzima, Helm and Todd relating or purporting to relate, to Counts One, Two, Three, Seven, Eight, Nine and Ten as far as petitioner's case was concerned as not being binding against o upon petitioner, and as being prejudicial to petitioner. (TR. 1891-1892)

Petitioner made a motion for mistrial. (TR. 1893)

The Court asked if petitioner had moved for severance or separate trial. (TR. 1896) When advised petitioner had moved for severance and separate trial and that Judge Weinberger had ruled on the motion, nothing more was said. (TR. 1896-97)

All of Petitioner's motions were denied. (TR. 1930)

On September 23, 1955, the jury returned a verdict finding Duke guilty as to all ten counts, petitioner guilty as to Counts IV, V and VI, Buono guilty as to Counts VII, VIII, IX and X, and not guilty as to Counts IV, V and VI.

Petitioner filed notice of appeal to the Court of Appeals for the Ninth Circuit on October 10, 1955.

The Court of Appeals for the Ninth Circuit had jurisdiction to review the judgment of the District Cou under the provisions of Title 28, United States Code, Section 1291.

ORDERS OF THE COURT OF APPEALS

On December 26, 1955, the Court of Appeals admitted petitioner to bail pending appeal.

On November 25, 1955, the trial Court issued its order authorizing Duke to prosecute his appeal in forma pauperis, (C. T. 338) and on March 29, 1956, The Honorable Albert Lee Stephens, Acting Chief Judge of the United States Court of Appeals, for the Ninth Circuit, authorized the hearing of Ballard's appeal on the same record filed on behalf of Duke.

The Honorable Paul P. O'Brien, Clerk thereof, has certified to this Honorable Court the entire record from the United States Court of Appeals, for the Ninth Circuit.

The Court of Appeals affirmed the judgment of the District Court against petitioner on August 13, 1957 (Appendix A), and all that Court had to say about the case of petitioner was:

> "Defendant Ballard was denied a bill of particulars because it was not clear who was actually to smuggle the birds into the United States and in what manner Ballard participated in the conspiracy and the various acts, and because it is not alleged who did the various physical acts. It is plain this was an attempt to have the evidence of the government disclosed before trial. The matter was in the discretion of the trial court, and this discretion was not abused.

"It is likewise in the sound discretion of the trial judge to say whether defendants should be tried separately or together. Ballard was charged by one only of the ten counts. He claims he was prejudiced by denial of a motion for severance. The record shows there was nothing improper in trying all defendants together.

The court gave an instruction on alibi, at the request of counsel for Ballard. If there were any just criticism of the original instruction of the court as to alibi, it was thus corrected.

Evidence was admitted in rebuttal, which Ballard says was admissible in chief. This indicates there was no error. The trial court has discretion as to order of proof, and the evidence was admittedly competent. No prejudice was shown."

In its second opinion of January 7, 1958, (Appendix B), the Court of Appeals affirmed the judgment of the District Court against petitioner and used the precise language quoted above except in the second paragraph of the quoted portion, there was one sentence changed as follows:

"Ballard was charged by only three of the ten counts."

QUESTIONS PRESENTED

FIRST QUESTION

Was it prejudicial error on a trial for conspiracy, where the duration of the conspiracy is established by the date of the first overt act set forth in the conspiracy charge and terminated by the date of the last overt act set forth in the conspiracy charge, to admit, over timely objection, evidence tending to show separate and distinct conspiracies independent of the charge of conspiracy contained in the indictment against petitioner, particularly after petitioner's timely and proper application for Bill of Particulars was refused by the trial court?

SECOND QUESTION

Was it prejudicial error to deny petitioner's motion for severance and separate trial when the record at the time of petitioner's motion therefor, and the ruling of the court thereon, showed that a denial of such motion would certainly result in prejudice to petitioner?

THIRD QUESTION

Was it prejudicial error to cause petitioner to be subjected to mass trial?

FOURTH QUESTION

Was petitioner lawfully convicted and punished for a violation of sections 371 and 545, Title 18, U.S.C., where the evidence does not show any violation of those sections by petitioner, but does show that petitioner

and others, entirely within the United States of America, entered into a conspiracy to rob, and did in fact, commit the crime of robbery against one who had possession of certain merchandise, and where contraband merchandise had never been in the possession of or under the control of petitioner?

FIFTH QUESTION

Was petitioner lawfully convicted when the evidence of the Government against petitioner was chiefly and almost entirely tainted evidence from tainted witnesses?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution is involved. The pertinent portions being:

> "****nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of **liberty**, without due process of law."

SUMMARY OF FACTS

John W. Hadzima was engaged in the business of smuggling psittacine birds into the United States from 1949 until a short time prior to 1955; from about 1950 to at least March of 1953, the witnesses John W. Hadzima, Nicholas A. Spicuzza and George Todd were engaged in a joint enterprise to smuggle psittacine birds into the United States from a foreign country. Hadzima testified he procured the services of Ballard,

through Pursselley in 1953, to steal birds in the United States from Spicuzza and Todd. Helm testified he told Hadzima, Pursselley, Duke, Buono and Ballard, at Buono's office, that Spicuzza and Todd were flying birds into Desert Center and that plans were made to rob and steal these birds from Spicuzza and Todd or their agents. The date the birds were to be landed was May 13, 1953. Spicuzza, Curtis, Hadzima and Helm fixed the date of the hijacking as May 13, 1953. Mary Asconi testified the birds were delivered to her aviary in Burbank, California, by Hadzima in the early morning of May 14, 1953.

On May 13, 1953, Hadzima, Pursselley and petitioner met Helm, Spicuzza and Curtis at Desert Center in Riverside County, California. The robbery took place. Petitioner Ballard was the strong arm man in the robbery. He remained at Desert Center with Spicuzza and Curtis. Hadzima and Pursselley took the birds. Hadzima later delivered them to the aviary of Asconi. The birds were later sold. Petitioner received a share of the proceeds.

The evidence on the charges against petitioner was furnished by:

John W. Hadzima, a twice convicted smuggler;

Nicholas A. Spicuzza, a twice convicted smuggler;

George Todd, a twice convicted smuggler;

Raymond Curtis, a convicted smuggler;

Robert Helm, a convicted smuggler;

Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled.

The United States Court of Appeals accepted petitioner's characterization of these witnesses.

Petitioner Ballard did not testify.

PREJUDICIAL EVIDENCE IMPROPERLY ADMITTED AGAINST PETITIONER

1. Thomas E. Johnson, Deputy Sheriff of San Diego County, testified that petitioner was arrested by him on or about February 20, 1953, in San Diego County, first for speeding and suspicion, and that he turned the petitioner over to United States Customs Officers because he had crates of parakeets in his truck, and that thereafter, petitioner Ballard was released by the Customs Officers. (TR. 1511 to 1521)

At the close of the Government's case, petitioner made a motion to strike from the evidence the testimony of the witness Johnson. This evidence was admitted over petitioner's timely objection.

The witness Hadzima testified, over timely objection by petitioner, that following the termination of his relations with Pursseley, Helm, Buono and Mary Asconi, that he, (Hadzima) Duke and petitioner Ballard were involved in a separate conspiracy from July, 1953, to December, 1954, during which time he smuggled some forty or fifty loads of birds into the United States. Hadzima testified that he and Ballard each took 45% of

the profits and gave Duke 10% in exchange for advice. (TR.842 - 860).

The witness Hadzima was allowed, over petitioner's timely objection, to give testimony affecting alleged conversations with petitioner Ballard, as to an alleged separate and distinct conspiracy, which conversations were alleged to have taken place during the month of February, 1953, and referred to acts and conducts entirely separated from, and having no connection with, the conspiracy charged in Count IV of the indictment. (TR. 714, et seq.)

At the close of the Government's case, petitioner made a motion to strike the testimony of Hadzima not having reference to the conspiracy charged in Count IV of the indictment. (TR. 1891)

All of these motions were denied and the trial court admonished the United States attorney to refrain from the use of the phrase "hijacking conspiracy." (TR. 1930)

REASONS FOR GRANTING WRIT

Certiorari should be granted in this case to resolve important questions of law as follows:

1. Concerning the first question raised herein, the reception in evidence, after objection, of separate and distinct conspiracies other than the one charged against petitioner, it is respectfully submitted:

That it was prejudicial error to admit the testimony of Thomas E. Johnson, Deputy Sheriff of San Diego County, over objection, and it was prejudicial error to admit the testimony of John W. Hadzima, over objection, on evidentiary matters, which on their face indicated they pertained to situations occurring long prior to the first overt act charged in the Fourth Count of the indictment, and long after the last overt act charged in the Fourth Count of the indictment.

That prejudice resulted to the petitioner from the reception of this evidence, which attached itself not at all to defendant Buono is readily apparent. The proof as to the conspiracy, the making of the plans for the robbery, and the details thereof, as shown by the evidence, took place in the office of defendant Buono, while he was present. Buono was acquitted as to Count IV, petitioner convicted as to Count IV.

Petitioner points out that from the inadmissible testimony of Hadzima, petitioner was very likely convicted of the conspiracy count, because of Hadzima's testimony as to the illegal smuggling of birds from July of 1953 until December of 1954.

Therefore, the most serious prejudicial error, petitioner believes, resulted from the admission of the testimony of Hadzima concerning the new conspiracy which Hadzima stated commenced in July of 1953, and continued until December of 1954, with only himself, Duke and petitioner members thereof. (TR. 842-860)

Prior to the time that the trial court made its final ruling denying petitioner a Bill of Particulars on June 24, 1955, at which time petitioner urged

information concerning the claim of the government subsequent to June of 1953, with reference to Count IV of the indictment, petitioner cited the case of Fishwick vs. United States, 329 U.S. 211, 67 S. Crt. 224, as holding that the date of the first overt act alleged, and the date of the last overt act alleged, marked the duration of the conspiracy. This was restated prior to the Government's opening statement. (TR. 48 to 52)

The dates of the overt acts set forth in Count IV of the indictment mark the scope of the conspiracy and its duration. That is to say, the date of the first overt act during April of 1953 marks the beginning of the conspiracy. The date of the last overt act during June of 1953 marks the termination of the conspiracy.

Fishwick vs. United States, 329 U.S. 211,
67 S. Crt. 224

Grunewald vs. United States, 353 U.S. 391,
77 S. Crt. 963

2. Concerning the second question, it was prejudicial error to deny petitioner's motion for severance and separate trial when the record then showed certainty of prejudice to petitioner, and the subsequent proceedings demonstrated that prejudice.

Opper vs. United States, (1954) 348 U.S. at 94, to the effect that there is an abuse of discretion denying such motion when prejudice appears.

When the court denied petitioner's motion on June 23, 1955, and before petitioner ever made his motion, and on June 3, 1955, defendant Duke stated in open court:

"I will be able to show that certain individuals, labor leaders and their attorneys, in league with Customs officers have entered into a conspiracy to, if I may say, if it please the Court, to obstruct justice themselves by procuring false evidence and having such evidence presented to the United States grand jury."

"I have clear proof, clear, unequivocal, undenied evidence that there has been a conspiracy entered into by officers of the court, attorneys in this community representing labor organizations, and United States Attorneys, not only to procure false evidence to have me indicted, but also to commit murder."

"Before I went before the Grand Jury to testify myself, my life was threatened by these people, and I think due to the interests of ----" (TR. 26A to 30A)

At this point everyone knew that the Duke trial would be a dog fight, and that anyone tried with defendant Duke would be prejudiced thereby.

The trial court contributed to the prejudice against petitioner, when he propounded this question:

(The Court): -----"Now, Mr. Whelan, do you want to state a position for Mr. Ballard? Do you join with Mr. Duke or are you at odds with him, as Mr. Langford is?" (TR. 3213)

Petitioner Ballard was not required to state a position re Duke. (Constitution, Fifth Amendment)

The court's question was improper.

The United States Court of Appeals for the Ninth Circuit clearly demonstrated the prejudice to petitioner in the denial of his motion for severance and separate trial when in its opinion of August 13, 1957, (Appendix A) it used the following language:

> "Although Duke now attempts himself to escape therefrom, the trial of the case was permeated by his charge that the prosecution was the result of plot or conspiracy by certain public officials, in conjunction with organized labor, to frame Duke on the charges in the instant case. These statements and innuendos were made in the first instance by Duke himself and included, among those supposed to be assisting in the combination to frame him, a federal judge who tried a companion case and members of the staff of the United States Attorney conducting previous prosecutions as well as the prosecution of the instant case. The trial court took this whole situation into consideration in his rulings upon the question of representation. We see no reason why the trial court should have been compelled to allow Duke to turn this proceeding into a Roman holiday, WITH THE OTHER DEFENDANTS and government witnesses and the public officials AS THE VICTIMS. (Emphasis added)."

The motion for severance and separate trial should have been granted.

United States vs. Perlstien, 120 F. 2d 276

Castellani vs. United States, 64 F. 2d 636

Kotteakos vs. United States, 90 L. Ed. 1557, 328 U.S. 750, 66 S. Ct. 1239

3. Concerning the third question, it was prejudicial error to cause petitioner to be subjected to mass trial.

To require petitioner to stand trial in the face of all allegations in all counts of the indictment, when actually the only incident in which petitioner was concerned in the charge against him was the planning to rob and the actual robbery in connection with the Desert Center "highjacking" conspiracy, resulted in gross prejudice to petitioner.

The very least the trial court should have done to insure petitioner a fair trial would have been to strike from the evidence, on the motion of petitioner, as it might affect petitioner, the evidence introduced by the Government in support of the charges contained in the seven counts of the indictment in which petitioner was not a defendant. Certainly the evidence of Spicuzza, Hadzima, Helm and Todd concerning their long range career in smuggling activities, and as it pertained to counts in the indictment in which petitioner was not named, had no application to the case against petitioner, and further shows the prejudice resulting to petitioner from the failure of the court to grant a severance and separate trial to petitioner; this evidence coupled with the evidence of the two separate and distinct conspiracies herein complained of had but one result.

The result was to subject petitioner to the type of mass trial such as was denounced in Kotteakos vs. United States, 90 L. Ed. 1557, 328 U.S. 750, 66 S. Ct. 1239; and Canella vs. United States, 157 Fed. 2d 470.

The situation in this case would seem to be one contemplated by Rule 19, governing review on certiorari, Subdivision B thereof:

> "has decided a federal question in a way in conflict with applicable decisions of the Supreme Court; or has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of the Supreme Court's power of supervision."

4. Concerning the fourth question raised, petitioner urges that the evidence will not support a conviction under the laws of the United States when the evidence shows that at all times when any plans were made for the alleged robbery, petitioner was in the United States of America, and at all times when the actual robbery took place, petitioner was in the United States of America, and that petitioner never had in his custody or under his control any contraband.

The United States Attorney, in his opening statement, referred to the Desert Center incident as the "hijacking" conspiracy and in his opening statement referred to Spicuzza being hijacked of that particular load of birds. (TR. 74)

Following the conclusion of the Government's case and during a discussion on various motions, the trial

court suggested to the United States Attorney that he refer to the Desert Center incident by some other term than the "hijacking" conspiracy, because it might tend to suggest to the jury that he was trying the defendants for hijacking from one another or one person committing a theft from another. (TR. 1930)

Should a smuggler bringing diamonds into the United States illegally, for example, be robbed of his diamonds, would the robber be guilty of a violation of the laws of the United States pertaining to importation of merchandise?

If an individual commits the crime of robbery entirely within the territorial limits of the State of California, does the Federal Government have any jurisdiction to prosecute him for that crime? In this particular case, if the smuggler Spicuzza had declared the birds and invoiced them at the proper Customs Office would the Federal Government have jurisdiction to prosecute petitioner for a conspiracy with others to rob Spicuzza of those birds, and of the actual robbery of Spicuzza of those birds within the territorial limits of the State of California?

The answer to both questions is an obvious no.

The fact that the victim of the robbery is a self professed and self confessed smuggler does not give the Federal Court jurisdiction to prosecute the robber for what is actually a violation of the laws of the State of California.

5. Concerning the fifth question, petitioner urges that the dignity of the United States Government will not

permit the conviction of any person on tainted testimony. Mesarosh vs. United States, 352 U.S. 1, 77 S. Ct. P.1.

The United States Court of Appeals in its opinion of August 13, 1957, adopted petitioners characterization of the witnesses. The court refers to them as co-laborers in the vineyard.

The Court of Appeals makes no comment about Mesarosh vs. United States, although cited and referred to in petitioner's closing brief.

It is submitted that this Honorable Court should take judicial notice of the fact that the character of a bird smuggler, one who wilfully, intentionally and purposely defrauds the Government and takes from the Government that which enables the Government to exist and survive is committing an act somewhat akin to treason. The smuggler will lie, cheat and steal.

Certainly a bird smuggler who is in prison, or under sentence or on probation, or faced with prosecution, can be expected to lie to further his own interests, --- or what he believes are his interests.

In petitioner's petition for rehearing, addressed to the United States Court of Appeals for the Ninth Circuit, following its opinion of August 13, 1957, petitioner made the following statement:

> "With the Mesarosh case in mind Ballard respectfully suggests in the interest of justice that this Honorable Court obtain fromthe U. S. Attorney a written report concerning the above-named Hadzima, Spicuzza, Todd, Helm, and

"Asconi and Curtis. Such a report Appellant believes and respectfully urges will show that since the trial in this case Hadzima has received a reduction of a prison sentence and forgiveness of a fine; that Spicuzza and Todd have received early paroles; that as to Helm a charge in violation of customs re whiskey importation was dropped (this one different from the case referred to in the evidence in this case); that Curtis was never prosecuted; and that a charge against Asconi of smuggling psittacine birds (different from any incident in this trial) was dropped or that she received probation.

Counsel for Ballard has neither the inclination nor the facilities for checking these items out, but has full confidence in the integrity of the U.S. Attorney to correctly present these matters to this Honorable Court in writing; and counsel for Ballard will accept such written report from the U.S. Attorney unquestioned and unchalleneged. In view of the testimony of these witnesses upon the trial of this case concerning lack of consideration to them for their testimony, an inquiry, in the light of the decision in Mesarosh, seems in order and if it appears the testimony of these witnesses was tainted testimony Ballard's conviction should not stand."

As far as petitioner can ascertain, this request was never acted upon by either the United States Court of Appeals or by the United States Attorney. In the light of the decision in the Mesarosh case, it is submitted that this situation is one falling within Subdivision B, Rule 19, of the Supreme Court concerning

considerations governing review on certiorari. Since the petition of Ballard for rehearing in the Court of Appeals was filed, petitioner has learned that Asconi had been convicted of smuggling and had received probation concerning an incident that took place about the time that she was a witness in the case against petitioner.

CONCLUSION

It is respectfully submitted that petitioner's conviction resulted from a denial of due process of law and that the errors of law presented herein warrant and require the granting of the Writ of Certiorari as prayed for.

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(Admitted to practice in the Supreme
Court of the United States
November 12, 1957)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN BALLARD and Vic Buono,	)	
Appellants,	)	No. 15,146
vs.	)	Aug. 13, 1957
UNITED STATES OF AMERICA,	)	
Appellee.	)	

Upon Appeal from the United States District Court
For the Southern District of California
Southern Division

Before: STEPHENS, LEMMON and FEE, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

This is a criminal case in which there was laid bare a tremendous traffic in the smuggling of psittacine birds into the United States from the Republic of Mexico. Irrespective of the merits, it is a sordid story of intrigue, double-dealing and feuds among the participants, with treacherous interludes and escapades.

Parrots, parakeets and, broadly speaking, any bird with a hooked beak are denominated psittacine birds. There is a quarantine against the importation of such fowl into the United States.[1] However, there appears to be a vast importation of these birds here. It is not the custom in this commerce to pay any duties on psittacines. Indeed, it would appear from the record that there is no known instance of such an impost having been paid.

In general, the participants in this traffic were as malodorous as the commerce therein itself. The testimony was furnished by co-defendants in the vineyard, who were characterized by one of the defendants as:

> "John W. Hadzima, a twice convicted smuggler, Nicholas A. Spicuzza, a twice convicted smuggler, George Todd, a twice convicted smuggler, Raymond Curtis, convicted smuggler, Robert Helm, convicted smuggler, Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled."

The indictment was in ten counts. Three separate conspiracies were charged (in Counts I, IV and VII). Five counts charged smuggling (II, V, VIII, IX and X). Two counts charged certain defendants with knowingly receiving, concealing and facilitating the transportation and concealment of certain birds after illegal transportation (III and VI).

---

[1]See 42 C.F.R. § 71.152(b), promulgated under authority of 42 U.S.C.A. § 264.

Appellants Duke, Ballard and Buono, having been convicted on certain counts by a jury, appeal.

All of these appellants raise the point that the convictions under 18 U.S.C.A. § 545,[2] the general smuggling statute for felony, cannot stand because the Surgeon General, under authority of 42 U.S.C.A. § 264, passed a health and safety regulation forbidding, with

---

[2]"Smuggling goods into the United States
"Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law ---
"Shall be fined not more than $5,000 or imprisoned not more than two years, or both.
"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.
"Merchandise introduced into the United States in violation of this section shall be forfeited to the United States." 18 U.S.C.A. § 545.

minor exceptions, importation of psittacine birds. See 42 C.F.R. § 71.152(b). This regulation carries a penalty for a misdemeanor. 42 U.S.C.A. § 271(a). The same argument is applied to 18 U.S.C.A. §§ 42 and 43. But these contentions have no validity. Appellants may have committed two crimes, one a misdemeanor and the other a felony. See Steiner vs. United States, 9 Cir., 229 F. 2d 745, cert. den., 351 U.S. 953. If there is any conflict between the statute and the regulation, the former prevails. See Murray vs. United States, 9 Cir., 217 F.2d 503; Callahan vs. United States, 285 U.S. 515. The case of Berra vs. United States, 351 U.S. 131, has no pertinency upon this point. Where different proof is required for each offense, a single act or transaction may violate more than one criminal statute. United States vs. Beacon Brass Co., 344 U.S. 43; United States vs. Noveck, 273 U.S. 202.

It is argued that psittacine birds are not merchandise which should have been invoiced under the customs laws. But this has no validity. Steiner vs. United States, supra. In that connection, it is urged that the substantive counts are defective because they were insufficient to charge that appellants violated 18 U.S.C.A. § 545, by failing to comply with 19 U.S.C.A. §§ 1461 and 1484. This latter point has no apparent connection with any count except those relating to receiving and facilitating. See Babb vs. United States, 5 Cir., 218 F.2d 538. As to the latter counts, the indictment there contained the statement that the importation was contrary to 19 U.S.C.A. ch. 4, and particularly to §§ 1461 and 1481 thereof.

Duke, who is a lawyer, complains of his representation before the court. Under the circumstances,

the complaint is of very little moment. He seems to have hoped, by complicating the situation, he could gain some advantage at the trial. Since that failed, he now attempts to use the situation he created as error to obtain reversal upon appeal. There is nothing more revolting in the American courts than the attempt of lawyers, as criminals, to use the guaranties set up for fair trial as technicalities to shield them from just conviction. The record in this case shows clearly that Duke is guilty. He has been convicted by a jury.

Duke attempted to impose a dilemma upon the trial court by proposing to represent himself and to associate a Mr. Fitzgerald, a lawyer, apparently as a junior. The court saw the difficulties and suggested that Duke appear in propria persona under limitations that he could not argue as to his own testimony to the jury or that he should turn the defense over to Fitzgerald. This was modified to permit Duke to examine and cross-examine witnesses. But Duke claimed the right to make the opening statement, and proclaimed that no one else was competent to make this presentation. The trial court ruled otherwise. Duke moved to have Mr. Fitzgerald released from the case, so that Duke could make the opening statement and conduct all further proceedings. The court denied this motion. Mr. Whelan, attorney for appellant Ballard, made the opening statement for Duke. The trial court explained that Duke had been under indictment for months and had made no appropriate attempts to settle the question of representation until the time of trial.

Although Duke now attempts himself to escape therefrom, the trial of the case was permeated by his charge that the prosecution was the result of plot or

conspiracy by certain public officials, in conjunction with organized labor, to frame Duke on the charges in the instant case. These statements and innuendos were made in the first instance by Duke himself and included, among those supposed to be assisting in the combination to frame him, a federal judge who tried a companion case and members of the staff of the United States Attorney conducting previous prosecutions as well as the prosecution of the instant case. The trial court took this whole situation into consideration in his rulings upon the question of representation. We see no reason why the trial court should have been compelled to allow Duke to turn this proceeding into a Roman holiday, with the other defendants and government witnesses and the public officials as the victims. The trial court was perfectly correct in maintaining firm control of his courtroom and of the proceedings therein. In this aspect of the cause at the outset of the trial, the trial court was not bound to allow Duke to use his position as defendant as a launching ground for missiles, even if as a lawyer he believed his best defense was the familiar one of trying the prosecutors and witnesses for the prosecution.

This situation was thereafter further complicated when the supposed "special defense" of conspiracy of the officials and others fell flat. Mr. Fitzgerald repudiated it. Now Duke assigns as error the trial of the issue by attempting to place the blame upon Mr. Fitzgerald, who, he said, misunderstood the defense on account of lack of preparation and unfamiliarity with the case. Duke also assigns as error that the trial court permitted extraneous issues to seep into the case to his prejudice. The record has been carefully reviewed. This Court finds Duke, and Duke alone,

responsible for the introduction and trial of these charges, and that he attempted to shift the burden thereof only when it was obvious the introduction was deleterious and not helpful to his cause.

There are other matters of no merit raised by Duke. (1) He complains that the witness Sankary was put on the stand by the government and asked only whether he had been subpoenaed by the defense. The defense did not call the witness. (2) Duke was asked an impeaching question on cross-examination. It was not followed up by testimony supporting the statement which he purportedly made. Sankary was one of the persons purported to have heard the statement by Duke. No objection was made at any time during the trial to either of these matters. There was no error.

Duke assigns as error certain argument by the prosecution calling attention to the absence of evidence to support the "special defense" of conspiracy by government officials and others. There was no objection at the time. When Duke referred to the matter at a subsequent time, the court ruled Duke had invited the comment. This was correct.

Exception was taken generally to the fact that the court commented upon the charge that certain government witnesses had in effect conspired together to tell false stories. The general effect of the comment was that the situation of the witnesses should be considered, especially as to what access and lack of access they had. It was said persons in the penitentiary are under some restraint and some degree of unavailability to others, but there are extents of availability. The jury were told to analyze the testimony and to determine whether

they could believe all or any part of it. Some of the witnesses had been in the penitentiary.

It is obvious that the court was directing, as it had a right to do, the jury to analyze the testimony and calling attention to some special circumstances in relation to the situation of these witnesses. The judge likewise admonished the jury that they were the judges of the facts and the credibility of the witnesses and they had the right to disregard entirely any comment of his.

The power of a trial judge in the federal court to comment fairly to the jury, if he leave to them the final decision and the power to disregard his remarks, has never been denied. The only question ever raised is whether he has abused his authority. The trial court here commented fairly and regarded the appropriate restrictions.

The court admitted the record of a telephone conversation held during the progress of the trial between Duke and Buono, both defendants on one side, and government witness Hadzima on the other. The recording was made by Duke. The trial record is confused, but Duke is apparently now claiming that he was prevented from cross-examining Hadzima as to the conversation. He also claims the conversation tended to prove a conspiracy against him. The ruling of the court gave him everything to which he was entitled, since the jury had the whole record and were entitled to judge thereby of the credibility of this witness. The conversation did not tend to establish a conspiracy to convict Duke.

There was no error in the refusal of the court to permit a witness to testify that during a certain period Duke was heavily in debt and had to borrow from the bank to meet current operating expenses. The purpose was to rebut testimony of Hadzima that he had paid Duke during this same period fabulous sums of money.

Likewise the court refused to allow Duke to show that Helm, a government witness, had, immediately prior to trial, engaged in collateral illegal conduct for which he had not been prosecuted. This was not error.

The trial court permitted Hadzima, a government witness, to have advice of private counsel while testifying. It must be said this is an extremely dangerous practice. There is some authority that it is within the discretion of the trial court. But, if a witness must have such advice during his testimony, the government had better not call him. The witness, upon advice of counsel, claimed the protection of the Fifth Amendment on certain questions, upon one of which the court ruled he was so entitled. Upon another question, the court ruled that certain phases were within the scope of his previous testimony, and required the witness to answer, but limited the question in other respects. Upon advice of his attorney, Hadzima corrected a former statement and revealed that he had been told that the prosecution of a different case would be dropped if Hadzima testified for the government in the instant case. This admission supported the theory of Duke and redounded to his benefit. He thus elicited, upon cross-examination, an interest or motive which might indicate bias after the witness had flatly denied such a fact on direct.

We entirely disapprove of the practice of any

witness in a criminal case, especially a government witness, receiving secret advice from anyone while he is on the stand. It is a destructive precedent. But, in the present case, it obviously did not harm Duke; but helped him. The error was not prejudicial.

The trial court refused to give a requested instruction of defendant to the effect that, if it were within the power of the government to produce stronger and more satisfactory evidence, and they failed to do so, the inference is that such evidence would be unfavorable to the government. The request was improper. A correct instruction would apply to either party, even in a criminal case. The balance of the requested instruction, that the burden of proof was on the government, was adequately covered and completely clear from the instruction given by the court.

The court gave an instruction at length to the effect that the uncorroborated testimony of an accomplice or co-conspirator is to be scrutinized and accepted with caution. Duke contends that the court should have instructed that "a conviction may not be had solely on the testimony of accomplices unless such testimony be corroborated by other evidence." This latter is not the rule in the federal courts. There was no error in the instructions given.

Defendant Ballard was denied a bill of particulars because it was not clear who was actually to smuggle the birds into the United States and in what manner Ballard participated in the conspiracy and the various acts, and because it is not alleged who did the various physical acts. It is plain this was an attempt to have the evidence of the government disclosed before trial.

The matter was in the discretion of the trial court, and this discretion was not abused.

It is likewise in the sound discretion of the trial judge to say whether defendants should be tried separately or together. Ballard was charged by one only of the ten counts. He claims he was prejudiced by denial of a motion for severance. The record shows there was nothing improper in trying all defendants together.

The court gave an instruction on alibi, at the request of counsel for Ballard. If there were any just criticism of the original instruction of the court as to alibi, it was thus corrected.

Evidence was admitted in rebuttal, which Ballard says was admissible in chief. This indicates there was no error. The trial court has discretion as to order of proof, and the evidence was admittedly competent. No prejudice was shown.

Buono raises the point that the counts of the indictment, I, IV and VII, charge three separate conspiracies. Several persons, including some defendants, were accused of membership in each of these conspiracies, which each related to the traffic in psittacine birds. Buono was charged by counts IV and VII, respectively, of membership in two of such conspiracies. He was acquitted on count IV, but convicted on count VII. He claims he was a victim of a mass trial. He further contends that there was only one conspiracy and that it is error to break the charge into three.

Kotteakos vs. United States, 328 U.S. 750, is an example of the mass trial of several conspiracies under

an indictment charging only one. As such, the convictions were set aside. But it needs no argument to prove that the reverse of this situation is unfair. If there were a conspiracy which continued over a long period of time and different persons were involved in different phases, it would not be improper to charge those in one phase with one conspiracy and use a separate count to charge all those in a different phase as co-conspirators in such different phase.

Instead of militating against the conclusion that this procedure was fair as to Buono, his acquittal on one conspiracy count and his conviction on another support it. For, if the indictment had been in only one count for one conspiracy, Buono would have been convicted of participation in the whole integrated conspiracy. That conviction would illustrate the danger of a mass trial. But here the jury discriminated. He was found guilty of that phase in which the jury found he participated and acquitted of conspiracy on other phases. Even though Buono could demonstrate that, considered from the standpoint of pure logic, splitting into several counts an integrated conspiracy was technically incorrect, he did not suffer injustice thereby.

The record as a whole demonstrates beyond possibility of doubt the guilt of each defendant of the crimes of which the jury convicted him. Furthermore, there is demonstrated a widespread, persistent and defiant combination to treat the criminal law as if it did not exist. Repeated convictions did not deter these felons. Humanitarian release on bail was capitalized by effecting new combinations and commission of other crimes. The record demonstrates that easy release on bail of hardened malefactors after conviction

breeds contempt of law and sardonic patronage of judges.

The trial as a whole was fair and impartial. Each defendant was demonstrably guilty. No record in any criminal case is so perfect that an astute lawyer cannot suggest possibility of error. Any error in this record was not prejudicial to any defendant. As has been shown, there was none of consequence.

Affirmed.

(Endorsed:) Opinion. Filed Aug. 13, 1957
Paul P. O'Brien, Clerk.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN BALLARD and VIC BUONO,	)	
Appellants,	)	No. 15,146
	)	Jan. 7, 1958
vs.	)	
UNITED STATES OF AMERICA	)	
Appellee.	)	

Upon Appeal from the United States District Court
for the Southern District of California
Southern Division

Before: STEPHENS, Chief Judge, LEMMON and FEE, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

This is a criminal case in which there was laid bare a tremendous traffic in the smuggling of psittacine birds into the United States from the Republic of Mexico. Irrespective of the merits, it is a sordid story of intrigue, double-dealing and feuds among the participants, with treacherous interludes and escapades.

Parrots, parakeets and, broadly speaking, any bird with a hooked beak are denominated psittacine birds. There is a quarantine against the importation of such fowl into the United States.[1] However, there appears to be a vast importation of these birds here. It is not the custom in this commerce to pay any duties on psittacines. Indeed, it would appear from the record that there is no known instance of such an impost having been paid.

In general, the participants in this traffic were as malodorous as the commerce therein itself. The testimony was furnished by co-laborers in the vineyard, who were characterized by one of the defendants as:

> "John W. Hadzima, a twice convicted smuggler, Nicholas A. Spicuzza, a twice convicted smuggler, George Todd, a twice convicted smuggler, Raymond Curtis, convicted smuggler, Robert Helm, convicted smuggler, Mary Asconi, admitted handler of psittacine birds known by her to have been smuggled."

The indictment was in ten counts. Three separate conspiracies were charged (in Counts I, IV and VII). Five counts charged smuggling (II, V, VIII, IX and X). Two counts charged certain defendants with knowingly receiving, concealing and facilitating the transportation and concealment of certain birds after illegal importation (III and VI).

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[1]See 42 C.F.R. § 71.152(b), promulgated under authority of 42 U.S.C.A. § 264.

Appellants Duke, Ballard and Buono, having been convicted on certain counts by a jury, appeal.

All of these appellants raise the point that the convictions under 18 U.S.C.A. § 545,[2] the general smuggling statute for felony, cannot stand because the Surgeon General, under authority of 42 U.S.C.A. § 264, passed a health and safety regulation forbidding, with

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[2] "Smuggling goods into the United States
"Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or
"Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law -- "Shall be fined not more than $5,000 or imprisoned not more than two years, or both.
"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.
"Merchandise introduced into the United States in violation of this section shall be forfeited to the United States." 18 U.S.C.A. § 545.

minor exceptions, importation of psittacine birds. See 42 C.F.R. § 71.152(b). This regulation carries a penalty for a misdemeanor. 42 U.S.C.A. 271 (a). The same argument is applied to 18 U.S.C.A. §§ 42 and 43. But these contentions have no validity. Appellants may have committed two crimes, one a misdemeanor and the other a felony. See Steiner vs. United States, 9 Cir., 229 F.2d 745, cert. den., 351 U.S. 953. If there is any conflict between the statute and the regulation, the former prevails. See Murray vs. United States, 9 Cir., 217 F.2d 503; Callahan vs. United States, 285 U.S. 515. The case of Berra vs. United States, 351 U.S. 131, has no pertinency upon this point. Where different proof is required for each offense, a single act or transaction may violate more than criminal statute. United States vs. Beacon Brass Co., 344 U.S. 43; United States vs. Noveck, 273 U.S. 202.

It is argued that psittacine birds are not merchandise which should have been invoiced under the custom laws. But this has no validity. Steiner vs. United States, supra. In that connection, it is urged that the substantive counts are defective because they were insufficient to charge that appellants violated 18 U.S.C.A. § 545, by failing to comply with 19 U.S.C.A. §§ 1461 and 1484. This latter point has no apparent connection with any count except those relating to receiving and facilitating. See Babb vs. United States, 5 Cir., 218 F.2d 538. As to the latter counts, the indictment there contained the statement that the importation was contrary to 19 U.S.C.A. ch. 4, and particularly to §§ 1461 and 1481 thereof.

Duke, who is a lawyer, complains of his representation before the court. Under the circumstances,

the complaint is of very little moment. He seems to have hoped, by complicating the situation, he could gain some advantage at the trial. Since that failed, he now attempts to use the situation he created as error to obtain reversal upon appeal. There is nothing more revolting in the American courts than the attempt of lawyers, as criminals, to use the guaranties set up for fair trial as technicalities to shield them from just conviction. The record in this case shows clearly that Duke is guilty. He has been convicted by a jury. Nevertheless, if the constitutional rights of Duke were violated, this Court must give him redress.

There are two principles which are founded on reason and authority in this field to which this Court gives full weight. First, an accused has an unquestioned right to defend himself.[3] Second, an accused should never have counsel not of his choice forced upon him.[4] This Court has never failed to recognize either of these fundamental rights.

As we review the record as to representation by counsel or in propria persona, it is clear that the

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[3] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel ****." 28 U.S.C.A. § 1654.

[4] "The Constitution does not force a lawyer upon a defendant." Adams vs. United States, 317 U.S. 269, 279.

confusion was caused by Duke and Duke alone. He acquiesced and consented to limitations on his right to represent himself. He attempted to repudiate the limitations subsequently, but that circumstance cannot vitiate his previous waiver. If defendant were an ignorant and untutored person, there might be some force to his present claim. But Duke is a trial lawyer of long experience.

Duke, at the hearing for arraignment and plea before a judge other than the one who tried the case, asked permission to proceed in propria persona for preliminary motions pertaining to the attack on the indictment. He represented to the judge at the time that counsel would appear for him at trial. Permission was granted.

Afterward, in apparent pursuance of this suggestion, Duke presented a Mr. Fitzgerald, a competent attorney, to the judge who eventually tried the case. However, at an informal colloquy in chambers, Duke indicated he wished Mr. Fitzgerald as an associate. The trial judge agreed that another lawyer should be in the case and suggested that Duke should not testify and also attempt to argue the case to the jury. Whatever may be thought of the legal basis of this idea, Duke fully agreed with the underlying practice and consistently held to that position throughout the trial.[5] The thesis of

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[5]"At one point he said: "I didn't ... -- please of the court, I had never intended to argue the case. I realize the rule, that having testified myself, I wouldn't be permitted to argue nor would it be wise for me to argue my own testimony or any of the testimony. And I realize my own emotional feelings in the case."

the trial court was apparently that Duke, if acting as client and lawyer, would be involved emotionally and prejudice his own case.[6] After a great deal of discussion, in which Duke, Fitzgerald and the trial judge participated, all were in agreement.

In open court, before the jury had been empaneled, Duke moved for the entry of Mr. Fitzgerald as co-counsel, and thus sought to impose a dilemma upon the trial judge. But the judge made his position clear that Duke could appear in proper person subject to limitations to which Duke had agreed or he could appear through counsel. As a result, Mr. Fitzgerald, who was of Duke's own choosing, entered the case as counsel for Duke. At the insistence of Duke, however, the latter was allowed, by the discretion of the court, certain personal participation such as examination of witnesses and making and arguing motions to the court. Parenthetically, the trial court was extremely fair in permitting Duke all the privileges agreed upon. Nothing was

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[6] The judge expressed himself as follows:
"The Court: Now, he being necessarily involved as a man would, emotionally in the problem, it is just not a good thing for him to be participating as an attorney in the courtroom. You know, Mr. Fitzgerald, how many times a lawyer will say or do things which will militate very strongly against him when he acts under the stress of emotion.
"Mr. Fitzgerald: Yes.
"The Court: How much more he is apt to do that if he is both client and lawyer? I don't think it is practical."

said about an opening address to the jury by Duke. Both Mr. Fitzgerald and Duke apparently agreed that the participation of Duke would be so limited, for the trial judge had made it abundantly clear that Mr. Fitzgerald was to have full control of the cause. When he accepted Fitzgerald as counsel subject to his personal participation only as permitted by the court, Duke made an election of record in open court.

After the jury was empaneled and before taking of testimony, the court again sought to clarify the status of Duke, so that there would be no confusion about his participation. It was pointed out that the obligation of Duke was to appear in propria persona or be represented by counsel, but that he did not have a right to a hybrid of the two.[7] However, the court reiterated its decision to permit Duke limited participation with his counsel. The court reserved all arguments of fact and the opening statement to the jury on behalf of Duke to Mr. Fitzgerald.

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[7]This is a correct statement of the law. See Shelton vs. United States, 5 Cir., 205 F.2d 806, 812-813. "The cases cited * * * stress * * * the right of an accused to act for himself and his right to have a lawyer assigned in his behalf. * * * Obviously, however, those rights cannot be both exercised at the same time." United States vs. Mitchell, 2 Cir., 137 F.2d 1006, 1010.

At this point, Duke for the first time insisted upon the right to make an opening statement, but the court ruled that Mr. Fitzgerald was to make this presentation. Duke claimed Mr. Fitzgerald was unprepared. The court then called attention to the fact that Duke had been under indictment for months and had made no appropriate attempts to settle the question of representation until the time of trial.

The trial judge offered to recess the case until Mr. Fitzgerald could prepare himself with the assistance of Duke to make the opening statement. The court said:

> "I know academically you are educated, Mr. Fitzgerald, but as to the facts, if you are not well prepared, you proceed last and I will see there is ample recess so that Mr. Duke can write it out, if he wants."

Duke refused this offer.

Duke then moved to have Mr. Fitzgerald released from the case. The court denied this motion.[8] Mr. Whelan, attorney for Ballard, made the opening statement for Duke, with the consent of the latter.

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[8]It should be noted that all these proceedings were out of the presence of the jury.

Duke was not denied the right to represent himself. Counsel was not forced upon him. Mr. Fitzgerald was counsel of Duke's own choosing. Duke consented to have Mr. Fitzgerald represent him, with limitations upon his own presentation. The court was not in error in refusing to permit Duke to repudiate his agreement to the arrangement. Any right Duke had was waived by his conduct and his informed consent.

Although there are expressions which, taken out of context, might indicate that Duke wished to try the case in propria persona, he never at any time unqualifiedly took that position. His duty was to have refused to proceed otherwise if he wished to raise the point here.

Although Duke now attempts himself to escape therefrom, the trial of the case was permeated by his charge that the prosecution was the result of plot or conspiracy by certain public officials, in conjunction with organized labor, to frame Duke on the charges in the instant case. If it can be believed that these statements and innuendos were not made in the first instance by Duke himself, at any rate these were specifically adopted[9] by him while on trial. Among those

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[9]"The Court: ***'*** But the reason those witnesses came forth and told what, to our defense contention is a trumped up story against us, is that a certain group of persons, Sankary, Hannah, Vader, Steward, some labor unions operating in this county, the Customs Service, the United States Attorney's office' -- I don't know if I have enumerated them all -- 'have combined together' -- and I think Judge Solomon -- 'to induce

supposed to be assisting in the combination to frame him were included a federal judge who tried a companion case and members of the staff of the United States Attorney conducting previous prosecutions as well as the prosecution of the instant case. The trial court may well have taken the whole situation into consideration in his rulings upon the question of representation. There have been examples of split representation whereby a lawyer defendant was enabled to use associate counsel as a shield while he engaged in offensive tactics himself. We see no reason why the trial court should

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these witnesses, who have testified for the government, to tell a false story or series of false stories in order to wreck the private vengeance of Vader, Sankary, Steward, and so on, against these particular defendants.'

"Now, I don't think it is claimed that Judge Solomon was personally out to get these particular defendants, but Judge Solomon is said to be going along with the plan and scheme, and the labor unions, Mr. Sankary, Mr. Steward, Mr. Vader, who are out to establish a trumped up false case against these defendant. * * *

"Now, is that right, Mr. Duke?"

"Mr. Duke: That is our defense, your Honor. That is my defense. However, I think your Honor has included persons in your enumeration of people, that were a part of the scheme, that I do not contend that were a part of it." (Emphasis supplied).

It is unnecessary to prolong the excerpt to show that Duke claims to have modified the position as to certain of the persons named and suggested that the Federal Bureau of Investigation was misled and the United States Attorney was unwittingly a party.

have been compelled to allow Duke to turn this proceeding into a Roman holiday, with the other defendants and government witnesses and the public officials as the victims. The trial court was perfectly correct in maintaining firm control of his courtroom and of the proceedings therein. In this aspect of the cause at the outset of the trial, the trial court was not bound to allow Duke to use his position as defendant as a launching ground for missiles, even if as a lawyer he believed his best offense was the familiar one of trying the prosecutors and witnesses for the prosecution.

This situation was thereafter further complicated when the supposed "special defense" of the conspiracy of the officials and others fell flat.[10] Mr. Fitzgerald repudiated it. Now Duke assigns as error the trial of the issue by attempting to place the blame upon Mr. Fitzgerald, who, he said, misunderstood the defense on account of lack of preparation and unfamiliarity with the case. Duke also assigns as error that the trial court permitted extraneous issues to seep into the case to his prejudice. The record has been carefully reviewed. This Court finds Duke, and Duke alone, responsible for the introduction and trial of these charges and that he attempted to shift the burden thereof only when it was obvious the introduction was deleterious and not helpful to his cause.

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[10]The caution of the trial judge in the first colloquy, that, if Duke personally participated to a great extent, he might prejudice his case, seems to have been fulfilled.

There are other matters of no merit raised by Duke. (1) He complains that the witness, Sankary, was put on the stand by the government and asked only whether he had been subpoenaed by the defense. The defense did not call the witness. (2) Duke was asked an impeaching question upon cross-examination. It was not followed up by testimony supporting the statement which he purportedly made. Sankary was one of the persons purported to have heard the statement by Duke. No objection was made at any time during the trial to either of these matters. There was no error.

Duke assigns as error certain argument by the prosecution calling attention to the absence of evidence to support the "special defense" of conspiracy by government officials and others. There was no objection at the time. When Duke referred to the matter at a subsequent time, the court ruled Duke had invited the comment. This was correct.

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calling attention to some special circumstances in relation to the situation of these witnesses. The judge likewise admonished the jury that they were the judges of the facts and the credibility of the witnesses and they had the right to disregard entirely any comment of his.

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The trial court permitted Hadzima, a government witness, to have advice of private counsel while testifying. It must be said this is an extremely dangerous practice. There is some authority that it is within the discretion of the trial court. But, if a witness must have such advice during his testimony, the government had better not call him. The witness, upon advice of counsel, claimed the protection of the Fifth Amendment on certain questions, upon one of which the court ruled that he was so entitled. Upon another question, the court ruled that certain phases were within the scope of his previous testimony, and required the witness to answer, but limited the question in other respects. Upon advice of his attorney, Hadzima corrected a former statement and revealed that he had been told that the prosecution of a different case would be dropped if Hadzima testified for the government in the instant case. This admission supported the theory of Duke and redounded to his benefit. He thus elicited, upon cross-examination, an interest or motive which might indicate bias after the witness had flatly denied such a fact on direct.

We entirely disapprove of the practice of any witness in a criminal case, especially a government witness, receiving secret advice from anyone while he is on the stand. It is a destructive precedent. But, in the present case, it obviously did not harm Duke, but helped him. The error was not prejudicial.

The trial court refused to give a requested instruction of defendant to the effect that, if it were within the power of the government to produce stronger and more satisfactory evidence, and they failed to do so, the inference is that such evidence would be unfavorable to the government. The request was improper. A correct instruction would apply to either party, even in a criminal case. The balance of the requested instruction, that the burden of proof was upon the government, was adequately covered and completely clear from the instruction given by the court.

The court gave an instruction at length to the effect that the uncorroborated testimony of an accomplice or a co-conspirator is to be scrutinized and accepted with caution. Duke contends that the court should have instructed that "a conviction may not be had solely on the testimony of accomplices unless such testimony be corroborated by other evidence." This latter is not the rule in the federal courts. There was no error in the instructions given.

Defendant Ballard was denied a bill of particulars because it was not clear who was actually to smuggle the birds into the United States and in what manner Ballard participated in the conspiracy and the various acts, and because it is not alleged who did the various physical acts. It is plain this was an attempt to have the evidence of the government disclosed before trial. The matter was in the discretion of the trial court, and this discretion was not abused.

It is likewise in the sound discretion of the trial judge to say whether defendants should be tried separately or together. Ballard was charged by only three of the

ten counts. He claims he was prejudiced by denial of a motion for severance. The record shows there was nothing improper in trying all defendants together.

The court gave an instruction on alibi, at the request of counsel for Ballard. If there were any just criticism of the original instruction of the court as to alibi, it was thus corrected.

Evidence was admitted in rebuttal, which Ballard says was admissible in chief. This indicates there was no error. The trial court has discretion as to order of proof, and the evidence was admittedly competent. No prejudice was shown.

Buono raises the point that the counts of the indictment, I, IV and VII, charge three separate conspiracies. Several persons, including some defendants, were accused of membership in each of these conspiracies, which each related to the traffic in psittacine birds. Buono was charged by counts IV and VII, respectively, of membership in two of such conspiracies. He was acquitted on count IV, but convicted on count VII. He claims he was a victim of a mass trial. He further contends that there was only one conspiracy and that it is error to break the charge into three.

Kotteakos vs. United States, 328 U.S. 750, is an example of the mass trial of several conspiracies under an indictment charging only one. As such, the convictions were set aside. But it needs no argument to prove that the reverse of this situation is unfair. If there were a conspiracy which continued over a long period of time and different persons were involved in different phases, it would not be improper to charge

those in one phase with one conspiracy and use a separate count to charge all those in a different phase as co-conspirators in such different phase.

Instead of militating against the conclusion that this procedure was fair as to Buono, his acquittal on one conspiracy count and his conviction on another support it. For, if the indictment had been in only one count for one conspiracy, Buono would have been convicted of participation in the whole integrated conspiracy. That conviction would illustrate the danger of a mass trial. But here the jury discriminated. He was found guilty of that phase in which the jury found he participated and acquitted of conspiracy on other phases. Even though Buono could demonstrate that, considered from the standpoint of pure logic, splitting into several counts an integrated conspiracy was technically incorrect, he did not suffer injustice thereby.

The record as a whole demonstrates beyond possibility of doubt the guilt of each defendant of the crimes of which the jury convicted him. Furthermore, there is demonstrated a widespread, persistent and defiant combination to treat the criminal law as if it did not exist. Repeated convictions did not deter these felons. Humanitarian release on bail was capitalized by effecting new combinations and commission of other crimes. The record demonstrates that easy release on bail of hardened malefactors after conviction breeds contempt of law and sardonic patronage of judges.

The trial as a whole was fair and impartial. Each defendant was demonstrably guilty. No record in any criminal case is so perfect that an astute lawyer cannot suggest the possibility of error. Any error in this

record was not prejudicial to any defendant. As has been shown, there was none of consequence.

Affirmed.

(Endorsed:) Opinion. Filed Jan. 7, 1958.

Paul P. O'Brien, Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,146

CLIFFORD L. DUKE, JR.,)
LOUIS GLENN BALLARD)
and VIC BUONO,)
)
Appellants,)
)
vs.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is

affirmed.

(Endorsed:) Judgment Filed and Entered: January 7, 1958.

Paul P. O'Brien, Clerk.